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BEFORE THE
DEPARTMENT OF CONSUMER AFFAIRS
FOR THE CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA

In the Matter of the Statement of Issues Against: ROBERT WILLIAM HOUGH 1037 Leucadia Blvd. Encinitas, CA 92024 Respondent.	Case No. A1 2008 190 **STATEMENT OF ISSUES**

Complainant alleges:

PARTIES

1. Richard L. Wallinder, Jr. (Complainant) brings this Statement of Issues solely in his official capacity as the Bureau Chief of the Cemetery and Funeral Bureau, Department of Consumer Affairs.

2. On or about April 23, 2008, the Cemetery and Funeral Bureau received an application for a Funeral Director License from Robert William Hough (Respondent). On or about February 26, 2008, Robert William Hough certified under penalty of perjury to the truthfulness of all statements, answers, and representations in the application. The Bureau denied the application on May 16, 2008. Respondent timely filed a request for an administrative hearing on the denial of the license on or about July 6, 2008.

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JURISDICTION

3. This Statement of Issues is brought before the Director of Consumer Affairs (Director) for the Cemetery and Funeral Bureau, under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 475 of the Code states:

> (a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:
>
> . . . .
>
> (2) Conviction of a crime.
>
> . . . .
>
> (4) Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.
>
> (b) Notwithstanding any other provisions of this code, the provisions of this division shall govern the suspension and revocation of licenses on grounds specified in paragraphs (1) and (2) of subdivision (a) .
>
> (c) A license shall not be denied, suspended, or revoked on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits.

5. Section 477 of the Code states:

> As used in this division:
>
> (a) "Board" includes "bureau," "commission," "committee," "department," "division," "examining committee," "program," and "agency."
>
> (b) "License" includes certificate, registration or other means to engage in a business or profession regulated by this code.

6. Section 480 states, in pertinent part:

> (a) A board may deny a license regulated by this code on the grounds that the applicant has one of the following:
>
> (1) Been convicted of a crime. A conviction within the meaning of this section means a plea or verdict of guilty or a conviction following a plea of nolo contendere. Any action which a board is permitted to take following the establishment of a conviction may be taken when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal, or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.

. . . .

(3) Done any act which if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made.

. . . .

7. Section 7709 of the Code states:

A plea or verdict of guilty or a conviction following a plea of nolo contendere is deemed to be a conviction within the meaning of this article. The bureau may order the license suspended or revoked, or may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order under the provision of Section 1203.4 of the Penal Code allowing such person to withdraw his plea of guilty and to enter a plea of not guilty, or setting aside the verdict of guilty, or dismissing the accusation, information, or indictment.

8. California Code of Regulations, title 16, section 1252 states:

For the purposes of denial, suspension, or revocation of a license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a licensed funeral establishment, licensed funeral director, or licensed embalmer if to a substantial degree it evidences present or potential unfitness of a licensed funeral establishment, licensed funeral director, or licensed embalmer to perform the functions authorized by his license in a manner consistent with the public health, safety, or welfare. Such crimes or acts shall include but not be limited to those involving the following:

(a) Conviction of a crime involving fiscal dishonesty.

(b) Any violation of the provisions of Chapter 12, Division 3 of the Business and Professions Code.

9. California Code of Regulations, title 16, section 1253 states:

When considering the denial of a license under Section 480 of the Business and Professions Code, the Board, in evaluating the rehabilitation of the applicant and his present eligibility for a license, will consider the following criteria:

(a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.

(b) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the Business and Professions Code.

(c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).

(d) The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.

(e) Evidence, if any, of rehabilitation submitted by the applicant.

FIRST CAUSE FOR DENIAL OF APPLICATION

(March 3, 2008 Criminal Conviction for Abuse of Counseling Patient)

10. Respondent's application is subject to denial under sections 480, subdivisions (a)(1) and 7709 of the Code in that he was convicted of a crime that is substantially related to the qualifications, duties, and functions of a funeral director. The circumstances are as follows:

a. On or about October 27, 2007, in a criminal proceeding entitled *The State of Nevada v. Robert William Hough,* in Clark County District Court, Case Number C179372, Respondent was convicted on his plea of guilty for violating Nevada Revised Statutes (NRS) 433.544(2)(b), abuse of client, a category B felony. On or about March 3, 2008, an Amended Judgment of Conviction (Plea of Guilty) was entered and Respondent was adjudged guilty of abuse of client, in violation of NRS 433.544(2)(a), a gross misdemeanor.

b. As a result of the conviction, on or about March 3, 2008, Respondent was sentenced to a maximum of five (5) years with a minimum parole eligibility of two (2) years in the Nevada Department of Corrections. The sentence was suspended and Respondent placed on probation for five years. Respondent was also ordered to attend professional counseling, to disclose the conviction to present & future employers, to stay away from the victim and her family, to not have explicit sexual material in his possession, to not have any device capable of accessing the Internet and not to access the Internet, and to conduct no counseling until probation is completed.

c. The facts that led to the conviction were that on or about July 2000, a detective at the Las Vegas Metropolitan Police Department (LVMPD) received a phonecall from "SBH." SBH told the detective that she had been the victim of sexual abuse while she was receiving counseling from Respondent. Two months later, the detective received a package from

SBH which contained a microcassette tape and a transcript of a recorded conversation between SBH and Respondent where they discussed prior acts during counseling sessions. As a result of the LVNPD investigation into the matter, it was determined that SBH suffered from a multiple personality disorder (or disassociative identity disorder), and began seeking counseling from Respondent at the referral of a pastor at a Las Vegas area church. From the period of February through May 2000, while SBH was a client of Respondent, Respondent engaged SBH in sexual fondling, kissing, and eventually oral and vaginal intercourse. SBH claimed that it was her alter identities who were engaging in the sexual contacts with Respondent. In an interview with Respondent in October 2000, Respondent admitted to the detective that he had engaged in inappropriate sexual contact with SBH. Respondent further admitted that he was aware that at the time he engaged in sex with SBH, that she was under the influence of one of her sexually aggressive alter identities.

SECOND CAUSE FOR DENIAL OF APPLICATION

(Commission of Acts That Would be Grounds for Suspension or Revocation of License)

11. Respondent's application is subject to denial under sections 480, subdivision (a)(3) of the Code in that Respondent's actions, had they been committed by a licentiate, would be grounds for suspension or revocation of the license.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Director of Consumer Affairs issue a decision:

1. Denying the application of Robert William Hough for a Funeral Director License;
2. Taking such other and further action as deemed necessary and proper.

DATED: 10/31/08

Richard L. Wallinder

RICHARD L. WALLINDER, JR.
Bureau Chief
Cemetery and Funeral Bureau
Department of Consumer Affairs
State of California
Complainant

BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
CEMETERY AND FUNERAL BUREAU
STATE OF CALIFORNIA

In the Matter of the Application of:	
ROBERT WILLIAM HOUGH,	Case No. A1 2008 190
	OAH No. 2009010300
Applicant/Respondent.	

DECISION AFTER NONADOPTION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on August 10, 2009, in San Diego, California.

G. Michael German, Deputy Attorney General, Department of Justice, State of California, represented complainant Richard L. Wallinder, Bureau Chief, Cemetery and Funeral Bureau (Bureau), Department of Consumer Affairs (Department), State of California.

Russell Robinson, Attorney at Law, represented applicant/respondent Robert William Hough, who was present throughout the administrative hearing.

The matter was submitted on August 10, 2009.

The proposed decision of the Administrative Law Judge was submitted to the Director of the Department of Consumer Affairs ("Director") on September 1, 2009. After due consideration thereof, the Director declined to adopt said proposed decision and thereafter on September 29, 2009 issued an Order of Non-adoption. Subsequently, on January 29, 2010, the Director issued an Order Fixing Date for Submission of Written Argument.

Written argument having been received from the Attorney General's Office and the time for filing written argument in this matter having expired, and the entire record, including the transcript of said hearing having been read and considered, the Director of

the Department of Consumer Affairs pursuant to Section 11517 of the Government Code hereby makes the following decision and order:

FACTUAL FINDINGS

Jurisdictional Matters

1. On April 25, 2008, Robert William Hough (Hough or respondent) applied to the Bureau for the issuance of a Funeral Director License.[1]

One of the questions in the application asked:

> "Have you ever been convicted of, or pled no contest to, a violation of any law of the United States, any state or local jurisdiction, or any foreign country?

In response to that question, Hough checked a box for "Yes."

2. On May 16, 2008, the Bureau sent Hough a letter advising him that his application for licensure was denied on the basis of his July 2003 conviction in Nevada of Abuse of Client in violation of Nevada Revised Statutes section 433.554(a). The letter further advised Hough of his right to contest the decision and request a hearing.

3. By letter dated July 6, 2008, Hough requested a hearing.

4. On October 31, 2008, complainant Richard L. Wallinder, Jr., Bureau Chief, Cemetery and Funeral Bureau (the Bureau), Department of Consumer Affairs, State of California, signed the statement of issues in his official capacity. The statement of issues sought the denial of the application of Robert William Hough (Hough or respondent) for a Funeral Director License based upon his July 2003 conviction for abusing a client. The statement of issues and other required jurisdictional documents were served on Hough, who timely filed a notice of defense on application.

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[1] Business and Professions Code section 7615 defines a "funeral director" as follows:

"A funeral director is a person engaged in or conducting, or holding himself or herself out as engaged in any of the following:

(a) Preparing for the transportation or burial or disposal, or directing and supervising for transportation or burial or disposal of human remains.

(b) Maintaining an establishment for the preparation for the transportation or disposition or for the care of human remains.

(c) Using, in connection with his or her name, the words 'funeral director,' or 'undertaker,' or 'mortician,' or any other title implying that he or she is engaged as a funeral director."

5. On August 10, 2009, the administrative record was opened. Jurisdictional documents were presented, opening statements were given, documentary evidence was produced, sworn testimony was received, closing arguments were given, the record was closed, and the matter was submitted.

Hough's Conviction

6. On July 22, 2003, Hough was convicted on his plea of guilty of violating Nevada Revised Statute section 433.544(2)(b) (abuse of a patient), a felony, in the District Court, Clark County, Nevada, in Case No. C179372 entitled State of Nevada, Plaintiff, v. Robert William Hough, Defendant.

On October 23, 2003, the District Court sentenced Hough to serve five years in state prison, but suspended the sentence and placed Hough on five years probation. Terms and conditions of Hough's probation required Hough to consent to searches, to have his employment approved, to disclose the conviction to all present and future employers, to attend approved counseling, to have no contact with the victim or her family, to have no sexually explicit material in his possession, to not enter any inappropriate entertainment establishment, to not use a fictitious name, to not possess an electronic device capable of accessing the Internet and to not access Internet during probation, to not counsel others while on probation, and to pay fines and fees of approximately $175.

On December 10, 2007, John A. Gonska, the Chief Parole and Probation Officer, petitioned the District Court for an order honorably discharging Hough from probation.

On December 20, 2007, Douglas Herndon, District Judge, ordered that Hough be honorably discharged from probation, that Hough's civil rights to vote and to serve as a juror in a civil action be restored, and that additional rights be restored with the passage of time.

On March 3, 2008, Hough's motion to withdraw his guilty plea was granted.

Circumstances of the Offense

7. In early 2000, Hough, who was a Pastor and the Director of Counseling with the Assembly of God in Las Vegas, met with a female patient, SH. Hough was a licensed family and marriage therapist in Nevada at the time. After meeting with SH, Hough came to believe that SH suffered from a borderline personality disorder, depression and anxiety. Hough engaged in a course of psychotherapy. On one occasion, Hough and SH engaged in sexual intercourse, which Hough knew was unethical and professionally inappropriate.

Several months later, SH contacted the Las Vegas Metropolitan Police Department and filed a complaint. In October 2006, Hough told an investigating officer that he had engaged in inappropriate sexual conduct with SH from February 2000 through May 2000, which concluded with the act of sexual intercourse in May 2000. Hough was arrested and booked.

Hough's Background and Rehabilitation

8. Hough was born in May 1953 in Tulsa, Oklahoma. He grew up in Tulsa, graduating from high school in 1971. Hough obtained a bachelor's degree in Biblical Studies from St. Louis Christian College in Missouri. Hough worked as a pastor at a church in Oklahoma after receiving that degree. In 1994, Hough received a master's degree in Counseling and a master's degree in Marriage and Family Therapy from Oral Roberts University in Oklahoma.

In January 1995, Hough joined the staff at the West Valley Assembly of God congregation in Las Vegas, Nevada, specifically to staff a proposed counseling department. Hough remained employed at the West Valley Assembly of God through May 2000 or so, when he resigned his position.

9. Before his encounter with SH, Hough was aware of the concepts of transference and counter-transference.[2] He knew that it was unethical for a therapist to engage in any kind of a sexual relationship with a patient. He knew that doing so constituted a boundary violation and that it was prohibited because of an inherent imbalance of power between a patient and the therapist. Hough knew that sexual encounters were not therapeutic and that they almost always were disastrous. Hough believed that SH presented with a borderline personality disorder, a condition characterized by unusual levels of instability in mood, chaotic and unstable interpersonal relationships, self-image, identity and behavior issues; as well as a disturbance in the patient's sense of self which, in extreme cases, could lead to periods of dissociation. Hough testified that in the course of their patient-therapist relationship, he came to believe that SH loved him and that he might be in love with her. Hough testified that "at no time did I ever pursue this person; at no time did I ever suggest that we engage in this sort of activity. That was part of the pathology of this person..." (AR 41:4-7.) . Hough testified he was aware of all of this before the sexual relationship with SH began. (AR 40:20-22.) He also acknowledged that he knew that patients come to a therapist in their "most vulnerable state" and that when a therapist violates a boundary, it interferes with a patient's treatment. (AR 40:5-8, 14-17.)

Notwithstanding all of this knowledge, Hough engaged in a brief sexual relationship with SH when he was her therapist for reasons he is still not able to describe. When asked on two different occasions during the hearing to explain why he did not say "no" to this relationship, Hough responded:

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[2] Transference is a phenomenon in psychoanalysis characterized by unconscious redirection of feelings for one person to another. In a therapy context, transference refers to redirection of a patient's feelings from a significant person to the therapist. Transference is often manifested as an erotic attraction towards a therapist, but can be seen in many other forms such as rage, hatred, mistrust, parentification, extreme dependence, or even placing the therapist in a god-like or guru status. Counter-transference is defined as redirection of a therapist's feelings toward a client, or more generally as a therapist's emotional entanglement with a client. A therapist's attunement to his or her own counter-transference is nearly as critical as his or her understanding of the transference.

"Your honor, that's a question that has haunted me for the past nine years. And I don't have a good answer for that." (AR 41:19-21.)

. . .

"I would identify opportunities that I had to stop what was growing and what was beginning, and I did not. And I wish I had a better answer to that." (AR 42:13-15.)

Nevertheless, Hough claimed that he has taken full responsibility for his misconduct. The Administrative Law Judge in this matter found that Hough was clearly remorseful, ashamed of what he had done, and concerned about the damage he might have caused SH.

10. Four days after engaging in sexual intercourse with SH, and well before SH reported the incident to the police, Hough began individual therapy with [redacted] Ph.D. a clinical therapist who was (then) practicing in Las Vegas. Hough told Dr. [redacted] what had occurred and how badly he felt about the situation. He resigned his position with the Assembly of God. Hough also appreciated that he had committed the biggest sin imaginable for a psychotherapist and, with Dr. [redacted] approval, he voluntarily relinquished his marriage and family therapist license. He fully cooperated when he was contacted by law enforcement, which was about five months after engaging in sexual intercourse with SH. He entered a guilty plea to all charges.

11. With the consent of the Nevada criminal justice system, Hough and his family moved to California, where Hough remained on probation but under California supervision. After arriving in California and before applying for any license, Hough began psychotherapy with [redacted] a licensed clinical psychologist with offices in Carlsbad, California. He did so to deal with his guilt, depression and anxiety, and not to gain a psychologist's recommendation for licensure.

12. Hough became employed by Stewart Enterprises, Inc.[3] as a funeral manager and cemetery manager, which did not require Hough to hold a license. Hough had contact with grieving family members and friends of the deceased, providing them with comfort, assistance and guidance, although as a matter of practice he was always accompanied by a funeral arranger[4] and a cemetery representative during these contacts. His employer did not require him to have a chaperone. If he were given a license, Hough testified that his interactions with families whose loved ones who have passed away would change "very little." (AR 47:21-25.)

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[3] Notice is taken that Stewart Enterprises, Inc. is one of the largest providers of funeral and cemetery products and services in the United States. As of April 2008, Stewart Enterprises owned and operated 219 funeral homes and 140 cemeteries in 24 states.

[4] Hough testified that funeral arrangers typically sit down with the families and go over the funeral arrangements, and the funeral establishments costs and legal responsibilities. The cemetery representative speaks directly with the families about cemetery options for either cremation or burial. (AR 47:8-20.)

Hough was initially employed at the Stewart Enterprise facility in Encinitas, where he supervised four others for more than three years. He established himself as a trusted and valued employee at the Encinitas facility. In February 2008, Hough was promoted and began providing services at the Stewart Enterprise facilities in Sorrento Valley, where he currently supervises 22 persons including funeral managers, an embalming staff, drivers, and others.

Hough believes he cannot be promoted from his current position within the Stewart Enterprise organization without first obtaining a Funeral Director's License, which is required to supervise multiple locations and to serve as a funeral director in charge.

13. Hough provided a letter from [redacted] Regional Vice President, Stewart Enterprises which supplemented and explained Hough's testimony concerning his work history and responsibilities. [redacted] letter confirmed that Hough disclosed the fact of his conviction on application employment, and that about a year ago he was promoted to a supervisory position at one of Stewart Enterprises' largest firms. Stewart Enterprises has never received any complaints about Hough. According to [redacted] Hough had demonstrated care and compassion for serving families in need.

14. Hough remains married to the same woman he married more than 26 years ago. They have two children, a daughter who lives in Ventura, and a son who is in the United States Navy.

15. Dr. [redacted] has served as a licensed psychologist for more than 35 years. He received a bachelor's degree in Psychology, a master's degree in Psychology, and a doctorate in Clinical Psychology, all from the University of Wisconsin, Milwaukee. After working in Wisconsin as a clinical psychologist for several years, Dr. [redacted] moved to California and set up a private practice. He has been licensed in California since 1986. No discipline has ever been imposed against any professional license.

Dr. [redacted] first encountered Hough on May 4, 2005, at his offices in Carlsbad. Hough came is as a result of a self-referral. Hough disclosed the fact of his conviction within five minutes of their first meeting. Dr. [redacted] described Hough as being a depressed and anxious person who said he "had shipwrecked his life." Hough described in detail the facts and circumstances giving rise to his conviction, expressing remorse and shame.

Dr. [redacted] believed that SH presented as a complicated patient with a borderline personality disorder, and that Hough responded by acting more as a rescuer than as a disinterested therapist.[5] The boundary issues became confused, and that was aggravated by the stress Hough was under at the time, which included an 80-hour workweek and the perfection he demanded of himself. As a result of the sexual encounter with SH, Hough was repentant, sorry and extremely angry with himself.

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[5] In Dr. Campbell's opinion, Hough is still a "rescuer", albeit "less so than what he was." (AR 22:4-6.)

Dr. [redacted] treated Hough for three years and three months, and then discharged Hough because "the objectives of treatment had been met." When Dr. [redacted] was treating Hough, Dr. [redacted] regularly corresponded with the Nevada criminal justice system. Hough never gave Dr. [redacted] any reason to believe that Hough had violated any of the terms or conditions of his probation. Dr. [redacted] came to believe that Hough did not pose any danger to the public. Hough had made amends for his wrongdoing in every manner legally possible. He was a good family man and a good employee.

Dr. [redacted] reached the following DSM-IV-TR diagnoses:[6]

[redacted]

Dr. [redacted] testified that the incident with SH represented an anomaly in Hough's otherwise praiseworthy life and "was a stupid mistake." He testified that Hough was the most impressive patient he has treated from the criminal justice system and that he has great confidence in Hough. He would not hesitate to recommend Hough to family and friends.

Evaluation

16. In July 2003, Hough was convicted of a very serious professional boundary violation – patient abuse – that arose out of misconduct occurring in early 2000. Hough immediately appreciated that he had engaged in wrongdoing, and he promptly sought

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[6] Notice is taken that the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition (DSM-IV) is published by the American Psychiatric Association and provides diagnostic criteria for mental disorders. It is used in the United States and in varying degrees around the world, by clinicians, researchers, health insurance companies, policy makers and others. A text revision of the DSM-IV, known as the DSM-IV-TR, was published in 2000.

The DSM-IV organizes each psychiatric diagnosis into five levels (axes) relating to different aspects of disorder or disability: Axis I: clinical disorders, including major mental disorders, as well as developmental and learning disorders; Axis II: underlying pervasive or personality conditions, as well as mental retardation; Axis III: acute medical conditions and physical disorders; Axis IV: psychosocial and environmental factors contributing to the disorder; and Axis V: Global Assessment of Functioning.

psychotherapy to deal with his guilt. This occurred before the matter was brought to the attention of law enforcement. Thereafter, Hough voluntarily relinquished his marriage and family therapist license without being requested to do so, recognizing that it was inappropriate for him to serve as a therapist. Hough did all that was asked of him while he was on probation. He was permitted to withdraw his guilty plea, although his conviction has not been expunged.

17. After arriving in California about five years ago, Hough assumed a position in the funeral and cemetery profession that did not require him to hold any professional license, even though his position put him in close contact with persons who had just lost a loved one and are vulnerable. Hough did not take advantage of his position. He remained law abiding and successfully completed psychotherapy. Hough now seeks a funeral director's license. He concedes his past misconduct, but claimed that he had rehabilitated himself to the extent that it would not be contrary to the public interest for him to hold such a license.

18. Persons holding a funeral director's license will inevitably have contact with individuals who are in great emotional distress as a result of the loss of a loved one, although not to the extent that others in the industry who are not required to hold a license will have such contact. As a result, to ensure public protection, the public must be assured that a person holding a funeral director's license will not abuse the public or take advantage of their clients by virtue of their positions and their ability to access a vulnerable population.

19. The offense for which Hough was convicted involved an unacceptable violation of trust by a licensed professional. Likewise, abuse of a client is entirely inconsistent with the holding of a funeral director's license. Funeral directors are in a special position of client trust and are expected to deal honestly and professionally with their clients. (Business and Professions Code sections 7692, 7693, 7700, 7707.) Funeral directors are expected to not take advantage of or mislead their clients. (Business and Professions Code sections 480, 7694, 7696, 7707.) As a result, Hough's conviction for patient abuse is deemed substantially related to the qualifications, functions, and duties of a licensed funeral director.

20. Hough has been law-abiding since his misconduct nearly ten years ago. He has made an effort to understand the reasons he engaged in that misconduct and to remediate any underlying psychological problems. He has been fully employed. He complied with all conditions of probation and was discharged from probation. He was permitted to withdraw his guilty plea. He will seek an expungement of his conviction when that becomes possible.

21. However, the apparent fact that no recurrence of misconduct has occurred since the conviction in July of 2003 does not automatically evince rehabilitation. Respondent must demonstrate to the satisfaction of the Bureau and the Department that he both understands why he committed the violations and that he accepts full responsibility for those violations. Respondent has not demonstrated that he understands

why he committed the acts that led to his conviction. As a result, the Director has determined that while significant progress towards total rehabilitation has been made Respondent's failure to understand what caused his extreme violation of patient trust means that an unrestricted license is not appropriate at this time.

22. However, in light of his expressions of remorse and consistent track record of respectable work in the industry, it would not be contrary to the public interest to grant Hough a probationary funeral director's license. Requirements would include a requirement that as a condition of his probation that there always be a chaperone present when he interacts with members of the public who seek funeral or cemetery services, as well as requirements for a psychological evaluation and notification to the Bureau of any citation or arrest. Further, Hough will be required as a term of probation to provide his employer with a copy of this decision and the Statement of Issues in this matter so that his employer is fully aware of the issues related to and restrictions placed upon Hough's license. Indeed, issuing such a license will provide greater public protection than is being afforded at this time.

LEGAL CONCLUSIONS

Burden and Standard of Proof

1. In a proceeding involving the issuance of a license, the burden of proof is on the applicant to show that he or she is qualified to hold the license. The standard of proof is a preponderance of the evidence. (California Administrative Hearing Practice (Cont.Ed.Bar 2d ed. 1997) The Hearing Process, §§ 7.51-7.53, pp. 365-367.)

Purpose of the Cemetery and Funeral Bureau

2. Business and Professions Code section 7601.1 provides as follows:

> "Protection of the public shall be the highest priority for the Cemetery and Funeral Bureau in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."[7]

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[7] Notice is taken that regulatory control of funeral directors and embalmers is vested in the Cemetery and Funeral Bureau, under the supervision and control of the Director of Consumer Affairs in the Department of Consumer Affairs. The duty of enforcing and administering statutory provisions governing funerals is vested in the chief of the bureau, who is appointed by the Director of Consumer Affairs, and the chief is responsible to the director for the enforcement and administration of those statutory provisions. Every power granted or duty imposed upon the director under these statutory provisions may be exercised or performed in the name of the director by a deputy director or by the chief, subject to such conditions and limitations as the director may prescribe. The Bureau may, pursuant to applicable statutory provisions governing administrative procedure, adopt and enforce reasonably necessary rules and regulations relating to the following:

Applicable Statutes

3. Business and Professions Code section 475 provides in part:

"(a) Notwithstanding any other provisions of this code, the provisions of this division shall govern the denial of licenses on the grounds of:

. . .

(2) Conviction of a crime.

. .

(4) Commission of any act which, if done by a licentiate of the business or profession in question, would be grounds for suspension or revocation of license.

. . .

(c) A license shall not be denied, suspended, or revoked on the grounds of a lack of good moral character or any similar ground relating to an applicant's character, reputation, personality, or habits."

4. Business and Professions Code section 480 provides in part:

"(a) A board[8] may deny a license regulated by this code on the grounds that the

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- the practice of embalming;
- the business of a funeral director;
- the sanitary conditions of places where such practice or business is conducted with particular regard to plumbing, sewage, ventilation and equipment;
- specifying conditions for approval of funeral establishments for apprentices and for approval of embalming schools;
- the scope of examinations;
- carrying out generally the various provisions of statutory provisions governing funerals;
- protection of the peace, health, safety, welfare and morals of the public.

The Bureau may inspect the premises in which the business of a funeral director is conducted, where embalming is practiced, or where human remains are stored.

The Cemetery Act provides for the certification and regulation of private cemeteries, including the establishment and maintenance of endowment care funds; the licensing and regulation of crematories; the registration and regulation of cremated remains disposers; and the licensing and regulation of cemetery brokers, brokerage corporations, and salespersons. The Bureau regulates those persons and entities licensed under the Cemetery Act.

[8] Under Section 22 of the Business and Professions Code. the word "board" includes any "bureau" in the Department of Consumer Affairs.

applicant has one of the following:

(1) Been convicted of a crime . . . .

. . .

The board may deny a license pursuant to this subdivision only if the crime or act is substantially related to the qualifications, functions or duties of the business or profession for which application is made . . . ."

5. Business and Professions Code Section 7709 provides in part:

"A plea . . . of guilty . . . is deemed to be a conviction within the meaning of this article. The bureau . . . may decline to issue a license, when the time for appeal has elapsed, or the judgment of conviction has been affirmed on appeal or when an order granting probation is made suspending the imposition of sentence, irrespective of a subsequent order . . . allowing such person to withdraw his plea of guilty. . . ."

Substantial Relationship

6. Licensing authorities do not enjoy unfettered discretion to determine on a case-by-case basis whether a given conviction is substantially related to the relevant professional qualifications. Business and Professions Code section 481 requires each licensing agency to develop criteria to aid it to determine whether a crime or act is substantially related to the qualifications, functions, or duties of the business or profession it regulates. (*Donaldson v. Department of Real Estate* (2005) 134 Cal.App.4th 948, 955-956.)

7. Under the Bureau's substantial relationship criteria set forth at Title 16, California Code of Regulations, section 1252:

> "For the purposes of denial . . . of a license pursuant to Division 1.5 (commencing with Section 475) of the Business and Professions Code, a crime or act shall be considered to be substantially related to the qualifications, functions or duties of a licensed funeral establishment, licensed funeral director, or licensed embalmer if to a substantial degree it evidences present or potential unfitness of a licensed funeral establishment, licensed funeral director, or licensed embalmer to perform the functions authorized by his license in a manner consistent with the public health, safety, or welfare. Such crimes or acts shall include but not be limited to those involving the following:
>
> (a) Conviction of a crime involving fiscal dishonesty.
>
> (b) Any violation of the provisions of Chapter 12, Division 3 of the Business and Professions Code."

8. Persons holding a funeral director's license will inevitability have contact with individuals who are in great emotional distress as a result of the loss of a loved one, although not to the extent that others in the industry who are not required to hold a license will have such contact. Nevertheless, as explained in the Factual Findings at paragraphs 18 and 19, persons holding funeral director's licenses are in a special position of client trust and are expected to deal honestly and professionally with their clients. Funeral directors are expected to not take advantage of or mislead their clients.

In July 2003, Hough was convicted of a very serious professional boundary violation – patient abuse – that arose out of misconduct occurring in early 2000. The offense for which Hough was convicted involved an unacceptable violation of trust by a licensed professional. Likewise, abuse of a client is entirely inconsistent with the holding of a funeral director's license.

It is concluded that Hough's conviction is substantially related to the qualifications, functions, and duties of a licensed funeral director. This conclusion is based on Factual Findings 6-12, 16-19 and Legal Conclusions 6-8.

Rehabilitation

9. Title 16, California Code of Regulations, section 1253 sets forth the Bureau's criteria for rehabilitation. The regulation provides:

> "When considering the denial of a license under Section 480 of the Business and Professions Code, the Board, in evaluating the rehabilitation of the applicant and his present eligibility for a license, will consider the following criteria:
>
> (a) The nature and severity of the act(s) or crime(s) under consideration as grounds for denial.
>
> (b) Evidence of any act(s) committed subsequent to the act(s) or crime(s) under consideration as grounds for denial which also could be considered as grounds for denial under Section 480 of the Business and Professions Code.
>
> (c) The time that has elapsed since commission of the act(s) or crime(s) referred to in subdivision (1) or (2).
>
> (d) The extent to which the applicant has complied with any terms of parole, probation, restitution, or any other sanctions lawfully imposed against the applicant.
>
> (e) Evidence, if any, of rehabilitation submitted by the applicant."

10. Rehabilitation is a state of mind and the law looks with favor upon rewarding with the opportunity to serve, one who has achieved reformation and regeneration. (*Pacheco v. State Bar* (1987) 43 Cal.3d 1041, 1058.) An individual's candor, cooperation and remorse, and a willingness to accept punishment and good faith efforts to rehabilitate

himself may be significant mitigating factors. (*Hipolito v. State Bar* (1989) 48 Cal.3d 621, 626.) The evidentiary significance of an applicant's misconduct is greatly diminished by the passage of time and by the absence of similar, more recent misconduct. (*Kwasnik v. State Bar* (1990) 50 Cal.3d 1061, 1070.) Since persons under the direct supervision of correctional authorities are required to behave in exemplary fashion, little weight is generally placed on the fact that a bar applicant did not commit additional crimes or continue addictive behavior while in prison or while on probation or parole. (*In re Gossage* (2000) 23 Cal.4th 1080, 1099.)

11. While Respondent has successfully completed his criminal probation and has no record of re-offending, the apparent fact that no recurrence of misconduct has occurred since the conviction in July of 2003 does not automatically evince rehabilitation. Although there is no exact formula for rehabilitation, generally, rehabilitation involves a two-step process. The first step is attitudinal, where the individual demonstrates that he understands and accepts that he is responsible for the violations. In short, an individual must show remorse and an understanding that what he or she did was wrong. The second is behavioral, where the individual demonstrates a consistent track record of appropriate behavior over a sufficiently extended period of time. That way, the Bureau and the public have some assurances that the person can practice his or profession with safety to the public.

12. The nature of Respondent's criminal misconduct was serious. The misconduct demonstrates a licensed professional's willingness to exploit a client for his own needs. As a result, to obtain an unrestricted license, Respondent must demonstrate to the satisfaction of the Director that he both understands why he committed the violations and that he accepts full responsibility for those violations.

13. Several times at hearing Respondent did not appear to know why he committed the crime against his client. In response to questioning on that point, Respondent merely states he does not have a "good answer" for it. What this lacks is a straightforward explanation of why he did what he did and a deeper understanding of why he took advantage of a woman who he knew was in a vulnerable mental state. Further, Respondent's answers at hearing do appear to disclaim some responsibility for his conduct. When referring to his former client, he testified that "at no time did I ever pursue this person" and suggested that his client's "pathology" was the cause for his misconduct. (Factual Finding 9.) This appears to diminish somewhat, his claim of total acceptance of responsibility for his actions.[9]

14. In light of the foregoing, an unrestricted license is not appropriate at this time. Weighing all factors in aggravation, mitigation and rehabilitation, including the length of time since his offense and his efforts at rehabilitation, however, it would be appropriate to consider

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[9] The ALJ found that Respondent expressed "great remorse." However, the ALJ did not identify any specific evidence of the observations of Respondent's demeanor, attitude or manner at the hearing. In short, he failed to describe factually how Respondent presented himself on the witness stand and why this caused him to conclude Respondent was remorseful. As a result the findings, although considered by the Director, are not entitled to "great weight" in the evaluation of Respondent's credibility.

issuance of a license for a lengthy period of time on appropriate probationary terms and conditions designed to ensure protection of the public. This conclusion is based upon Factual Findings 7-22 and Legal Conclusions 9-15.

Cause Exists to Authorize the Issuance of a Restricted License

15. Cause exists to deny Hough's application for an unrestricted Funeral Director's License under Business and Professions Code sections 480, subdivisions (a)(1) and (a)(3), and 7709. In July 2003, Hough was convicted of patient abuse, a substantially related criminal conviction which arose out of Hough's sexual misconduct with a patient occurring in early 2000. Hough immediately appreciated that he had engaged in wrongdoing, took prompt steps to rehabilitate himself, cooperated with law enforcement officers and the criminal justice system, voluntarily relinquished his marriage and family therapist license, moved to California and assumed a position in the funeral and cemetery profession that did not require him to hold a professional license, and successfully completed psychotherapy. Hough has been law-abiding since the misconduct occurring nearly ten years ago. He complied with all conditions of probation, was discharged from probation, and withdrew his guilty plea.

Under the circumstances, it would not be contrary to the public interest to grant Hough a probationary funeral director's license and to require as a condition of his probation that there always be a chaperone present when he interacts with members of the public who seek funeral or cemetery services; indeed, issuing such a license will provide greater public protection than is being afforded at this time.

This conclusion is based on all Factual Findings and on all Legal Conclusions.

ORDER

Respondent Robert William Hough's application for an unrestricted Funeral Director's License is granted and a funeral director's license issued; provided, however, that respondent's license shall be immediately revoked, stayed and placed upon four years' probation and shall be subject to all of the following terms and conditions.

1. Obey All Laws.

Respondent shall comply with all conditions of probation and obey all federal, state and local laws, and all rules and regulations governing the programs regulated by the Bureau and the Department of Consumer Affairs.

2. Quarterly Reports.

Respondent shall submit quarterly declarations under penalty of perjury, in a format designated by the department, stating whether or not respondent has been in compliance with all the conditions of probation. Respondent shall also submit such additional written

reports and verifications of actions requested by the department. Should the final probation report not be made as directed, the period of probation shall be extended until such time as the final report is made.

3. Provision of Records.

Respondent shall provide specific records for department inspection and review as required. In particular, Respondent shall provide the Cemetery and Funeral Bureau with written notice of any citation or arrest within 72 hours of any citation or arrest. The written notification shall set forth the date of the citation or arrest, the name of the citing or arresting law enforcement agency, the address of the citing or arresting law enforcement agency, the offense or offenses for which respondent was cited or arrested, and the name and address of the court or other agency where respondent is to make any appearance. Written notice shall be mailed to the Cemetery & Funeral Bureau, Department of Consumer Affairs, 1625 North Market Blvd., Suite S208, Sacramento, CA 95834.

4. Notification to Employer.

Before assuming any position as a licensed funeral director, respondent shall provide a true copy of the Decision(s) and the Statement of Issues in this matter to the Chief Executive Officer of every entity where respondent will be providing professional services as a funeral director. Respondent shall submit proof of compliance to the Bureau or its designee within 15 calendar days of the effective date of the Decision herein.

This condition shall apply to any change in employment while respondent is on probation.

5. Limitation of Duties.

Respondent's duties or services shall be limited as designated.

During probation, respondent shall have a third party chaperone present while consulting, meeting with or advising any member of the public in person. Within 30 calendar days of the effective date of this Decision, Respondent shall submit to the Department or its designee, for prior approval, a plan to implement this restriction. If the plan includes direct supervision by Respondent's employer, the plan shall include the name and title of the supervisor responsible for supervising Respondent. The proposed third-party chaperone shall have no existing or prior personal relationship with Respondent. Respondent shall submit proof satisfactory to the Department of this term of probation.

6. Interview with Department Representative.

As necessary, respondent shall appear in person for scheduled interviews with the Director or other designated representative for the purpose of monitoring compliance with the terms of this decision.

7. Psychological Evaluation.

Within 30 days of the effective date of this decision, and on a periodic basis thereafter as may be required by the department or its designee, respondent shall undergo psychological evaluation by licensed psychologists and/or psychiatrists as are approved by the department. Such evaluator shall furnish a written report to the department or its designee regarding respondent's judgment and ability to function independently, safely and not pose a threat to the public. The cost of such evaluation shall be borne by respondent. Respondent shall execute a Release of Information authorizing the evaluator to release all information to the department. Respondent shall comply with the recommendations of the evaluator. The evaluation shall be treated as confidential by the department and is not subject to discovery.

8. Out of State Residence or Operation.

Should respondent leave California to reside or operate outside this state, respondent must notify the department in writing of the dates of departure and return. Reporting in person may be waived if the respondent moves out of the state. However, respondent shall continue compliance with other terms of probation to retain California licensure. Periods of residency, business operation or employment outside California shall not reduce the probationary period.

9. License Issued During Probation.

Any license or registration issued to respondent by the department during the period of probation shall be issued as a probationary license or registration and is subject to all the terms and conditions set forth herein. Respondent must comply with terms and conditions herein and demonstrate no cause for disciplinary action or denial of an application.

Respondent shall not be permitted to petition for a reduction in penalty, the modification of any probationary term, or the early termination of probation until at least two years from the effective date of this decision have elapsed.

10. Violation of Probation.

Should respondent violate probation in any respect, the Director of the Department of Consumer Affairs, after giving respondent notice and an opportunity to be heard, may revoke probation and carry out the disciplinary order which was stayed. If an Accusation or Petition to Revoke Probation is filed against respondent during probation, the department shall have continuing jurisdiction until the matter is final, and the probation shall be extended until the matter is final.

11. Completion of Probation

Upon successful completion of probation, respondent's license will be fully restored.

This Decision shall become effective on MAY 30, 2010.

IT IS SO ORDERED this 30th day of April, 2010.

Doreathea Johnson

DOREATHEA JOHNSON
Deputy Director, Legal Affairs Division
Department of Consumer Affairs